Supreme Court, U.S.
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No. 92-1534

In The

Supreme Court of the United States

October Term, 1992

ANDREW L. SMITH,

Petitioner,

v.

R. JACK AYRES, JR.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY BRIEF

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This is the Reply Brief of Petitioner Andrew L. Smith ("Andrew") to the Brief in Opposition submitted by Respondent R. Jack Ayres, Jr. ("Ayres").

AYRES HAS NOT PROVIDED A FAIR SUMMARY OF THE FACTS

This case was not tried and the district court did not grant a motion for summary judgment. Rather, the district court dismissed Plaintiff's Complaint pursuant to the Defendant's Supplemental Motion to Dismiss. (A2). The facts as summarized in Andrew's Petition for Writ of Certiorari are fully supported by the allegations set forth in Plaintiff's Second Amended Complaint and the summary judgment evidence submitted by Plaintiff in opposition to Defendant's Motion for Summary Judgment.

Ayres' Brief in Opposition does not provide the Court with a fair summary of the facts. Not only did Ayres ignore the tape recorded conversations involving Clayton and Ayres confirming the scheme to reissue SPS stock to Clayton, Ayres put his own spin on the facts surrounding the Wren Letter fraud and otherwise failed to draw all reasonable inferences in Plaintiff's favor as required by *H.J., Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 249-50 (1989) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Pursuant to Supreme Court Rule 15.1, a brief in opposition

> should address any perceived misstatements of fact or law set forth in the petition which have a bearing on the question of what issues would

> properly be before the Court if certiorari were granted. . . . Counsel are admonished that they have an obligation to the Court to point out any perceived misstatements *in the brief in opposition*, and not later.

See, also, Rules 15.2 & 24.2. Although Ayres makes the global claim that "Andrew's statement of the case is riddled with inaccuracies and self-serving conclusions and statements" (Brief in Opposition p. 2 n. 1), Ayres does not cite the Court to a single inaccuracy, a single omission, or a single misrepresentation in Andrew's Petition.

Instead of pinpointing any alleged inaccuracies or misstatements in Andrew's Statement of the Case, Ayres engages in wholesale revisionism with a full gloss of lame excuses, limp explanations, and ludicrous extenuating circumstances, all of which are contrary to the allegations in Plaintiff's Complaint and Plaintiff's summary judgment evidence. But even with Ayres' inaccurate recharacterization of the facts, there are some matters which Ayres simply can't explain. For example, Ayres can't explain why he inserted the bogus 5:00 p.m. deadline in the demand letter which he wrote to himself (the "Wren Letter") when no such purported deadline had been discussed with Clayton, Mr. Wren or anyone else, and why he used this phony deadline to stampede the SPS directors into immediate and uninformed action toward reissuing SPS stock to Clayton.

Indeed, in his slanted Statement of the Case Ayres has maneuvered through the facts like an enemy soldier crawling through a mine field. And for good reason. Ayres knows that he got caught red-handed orchestrating

an ingenious stock fraud scheme to shift control of SPS away from Andrew and his mother to Clayton and Mark, and is only hoping for a technicality to escape accountability for his fraudulent conduct. We respectfully request our day in court to prove our claims against Ayres.

I. ANDREW NEED NOT AMEND HIS COMPLAINT TO ASSERT AN ASSIGNED CLAIM

Without citation to any authorities, Ayres argues that because Andrew did not amend his complaint to assert standing as assignee of the claims of SPS, "he has not preserved for review the issues he seeks to present to this Court." (Brief in Opposition p. 11). Ayres is wrong.

In Plaintiff's Response to Defendant's Supplemental Motion to Dismiss, Andrew specifically informed the district court of the assignment to Andrew of SPS' claims against Ayres and that Andrew had standing to pursue SPS's securities fraud claims under that express assignment. Further, Fed.R.Civ.P. 25(c) provides that when there has been a transfer or assignment of an interest in a case,

> the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party.

"The most significant feature of Rule 25(c) is that it does not require that anything be done after an interest has been transferred." 7C Wright, Miller & Kane, *Federal Practice and Procedure* §1958 p. 555 (1986).

II. THE FIFTH CIRCUIT'S DECISION IS NOT ONLY WRONG IN THIS CASE, IT IS BAD LAW

Ayres argues that this case is not worthy of review by this Court because "[n]either of the courts below sought to enunciate any significant ruling to control . . . Rule 10b-5 suits." (Brief in Opposition p. 12). Ayres is wrong.

As part of the settlement of Andrew's claims against SPS, Clayton and Mark, SPS expressly assigned its claims against Ayres to Andrew and granted Andrew the right to sue as assignee of such claims. The trial court dismissed Plaintiff's complaint, not because of some unique fact issue pertaining to the case, but because it was of the erroneous opinion that "Rule 10b-5 securities fraud actions are not assignable." (A3).

The Fifth Circuit affirmed the erroneous decision of the trial court by applying a novel fact-sensitive test gleaned from *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975). While the answers to the two questions posed by the Fifth Circuit in determining the assignability of a Rule 10b-5 claim do turn on the facts of each case, the erroneous analytical test announced by the Fifth Circuit in *Smith v. Ayres II* would bring into question the validity of every assignment of every Rule 10b-5 claim.

The slippery slope subjective test announced by the Fifth Circuit only beclouds an aspect of Rule 10b-5 litigation which deserves clarification and elucidation. *See Lowry v. Baltimore & Ohio R.R. Co.*, 707 F.2d 721 (3d Cir. 1983) (*en banc*), *cert. den'd*, 464 U.S. 893 (1983). As noted by Judge Hoeveler:

> The concerns expressed in *Blue Chip* are not present in the case at bar. Permitting [plaintiff] a cause of action under Rule 10b-5 based on the express assignment from the settlement class will not encourage "strike" suits. The Class members were purchasers and sellers who allegedly were injured by the fraudulent actions of Defendants. Allowing [plaintiff] to litigate a portion of these claims on the Class's behalf does not make the suit a "nuisance". Nor does an express assignment by one who has standing to sue introduce the evidentiary problems present in *Blue Chip*. In this case, those persons who were allegedly defrauded can testify that they relied on a specific misrepresentation or omission when they bought or sold their securities.

AmeriFirst Bank v. Bomar, 757 F.Supp. 1365, 1372 (S.D.Fla. 1991).

III. THE FIFTH CIRCUIT'S OPINION IS IN CONFLICT WITH DECISIONS OF THIS COURT, AND THIS CASE INVOLVES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE RESOLVED BY THIS COURT

Next Ayres argues that this case is not certworthy because Andrew supposedly failed to show either (a) "how the Fifth Circuit's opinion is in conflict with a prior opinion of this Court" or (b) "a real conflict between the Fifth Circuit and other circuits on the same matter of law or fact." (Brief in Opposition p. 13). Again Ayres is wrong.

First, on pages 14, 21 and 22 of Andrew's Petition we did show how the Fifth Circuit's affirmance of the result

of the district court based on two fact-sensitive considerations not argued by the Defendant or utilized by the district court in invalidating the assignment is in conflict with this Court's decisions in *Fountain v. Filson*, 336 U.S. 681, 683 (1949); *Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 136, 156 (1963); and *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 533 (1958). Moreover, this Court in *Blue Chip Stamps* held that in order to maintain 10b-5 standing, the plaintiff must qualify as an actual "purchaser" or "seller" of securities. 421 U.S. at 731. Because *Blue Chip Stamps* did not address the issue of whether a plaintiff with purchaser-seller standing could assign its Rule 10b-5 claim, *Smith v. Ayres II* does not constitute a technical conflict with *Blue Chip Stamps*. Nevertheless, in affirming the dismissal of Plaintiff's Complaint the Fifth Circuit applied the *Blue Chip Stamps* purchaser-seller limitation to a situation where it was not intended to apply (*AmeriFirst*, 757 F.Supp. at 1370-72; *Gardner v. Surnamer*, 608 F.Supp. 1385, 1390 (E.D.Pa. 1985); *see, generally*, Note, *Express Versus Automatic Assignment of Section 10(b) Causes Of Action*, 1985 Duke L.J. 813, 823 & 828-30 (1985)), which is roughly tantamount to a conflict on point.

And second, we never argued that there was a conflict between the Fifth Circuit and the other circuits on the issues raised in the Petition. Rather, under the guidelines set forth in Supreme Court Rule 10.1(c), we argued that (1) the question of the assignability of a Rule 10b-5 securities fraud claim; and (2) the question of the power of the district court to entertain a plaintiff's pendent

claims along with the expressly remanded federal question claim, are important questions of federal law which have not been, but should be, settled by this Court.

IV. THE FIFTH CIRCUIT ERRONEOUSLY AFFIRMED THE RESULT OF THE DISTRICT COURT BASED ON TWO FACT-SENSITIVE CONSIDERATIONS WHICH WERE NOT ARGUED BY THE DEFENDANT OR UTILIZED BY THE DISTRICT COURT IN INVALIDATING THE ASSIGNMENT OF SPS' RULE 10B-5 CLAIMS

While we agree that an appellate court can affirm the decision of a trial court even though the trial court relied on the wrong reason in reaching its result (*Fountain*, 336 U.S. at 683; *Heirs of Fruge v. Blood Services*, 506 F.2d 841, 844 n. 2 (5th Cir. 1975)), an appellate court may not do so where the aggrieved party was not accorded a "full and fair opportunity to develop facts relevant to the decision." *Id. See, also, Florida Lime*, 373 U.S. at 156; *Byrd*, 356 U.S. at 533; *Commissioner of Internal Revenue v. Josephs*, 168 F.2d 233, 237 (8th Cir. 1948).

As admitted by Ayres, "the decisions below are fact sensitive and fact determinative." (Brief in Opposition p. 12). However, we were never given the opportunity to develop facts relevant to the two allegedly dispositive fact-sensitive inquires announced by the Fifth Circuit in *Smith v. Ayres II*. The sua sponte "findings of fact" by the Fifth Circuit denied Plaintiff his day in court as to a disputed part of the case on which the trial court has never ruled. Where this "full and fair opportunity" was not made available, "the proper resolution of the appeal

is not affirmance but remand." *Heirs of Fruge*, 506 F.2d at 844 n. 2.

V. THE FIFTH CIRCUIT AND THE DISTRICT COURT REFUSED TO ACKNOWLEDGE THE PENDENCY OF PLAINTIFF'S PENDENT CLAIMS

Ayres argues that the district court, upon remand from the prior reversal, was not required to "continue to entertain" Plaintiff's pendent claims when the district court decided that the last remaining basis for independent federal jurisdiction had ended. (Brief in Opposition p. 15). We agree. But that is not the situation before the Court. Rather, upon remand the district court simply refused to acknowledge the pendency of Plaintiff's pendent claims.

Ayres claims that Andrew could have avoided any potential statute of limitations problems pertaining to Andrew's pendent claims by the filing of a state court suit against Ayres within 60 days following the district court's original dismissal of Andrew's federal claim. (Brief in Opposition p. 15). However, upon the prior remand, the district court never acknowledged the pendency of Plaintiff's pendent claims. Because the district court never addressed Plaintiff's pendent claims in any order or judgment, we were never given the opportunity to file our pendent claims in state court. Thus, the Fifth Circuit's opinion is contrary to the policy of handling pendent claims so that they are not barred by limitations. *See Carnegie-Mellon University v. Cohill*, 484 U.S. 341, 351-52 (1988).

CONCLUSION

Based on the foregoing, and the reasons set forth in our Petition for Writ of Certiorari, we respectfully request that the Court grant Andrew's Petition for Writ of Certiorari, and that the Court then reverse *per curiam*, without further ado, the order and judgment of the Fifth Circuit. Otherwise, this case should be scheduled for plenary briefing and argument.

DATED: May 11, 1993.

Respectfully submitted,

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